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JUN 15 1945
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 1208

CLARA I. MAYS,
Petitioner,

v.

WILLIAM T. BURGESS, *et al.*,
Respondents.

PETITION FOR RECONSIDERATION OR REHEARING AND REASONS THEREFOR

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Printed by Law Reporter Ptg. Co., 518 5th St., Washington, D. C.

INDEX

	Page
Petition for Rehearing	1
Jurisdiction	1
Reasons Relied Upon:	
I. Denial of certiorari here must leave the law of the District of Columbia on an issue of great importance settled not according to the independent judgment of the Court of Appeals but through misapprehension that controlling views have heretofore been expressed by this Court	2
II. The constitutional issues presented are substantial and should be disposed of only after full argument and consideration on their merits	3
III. The granting of certiorari here would be consistent with similar action by this Court in cases involving issues of local concern in the District of Columbia	4
IV. The demonstrable consequences of racial zoning by restrictive covenants are so grave in the District of Columbia and throughout the country that this Court should not refuse to adjudicate the issue as here presented	7
Conclusion	15

CITATIONS

Cases

	Page
American Federation of Labor v. Swing, 312 U. S. 321	4
Best v. District of Columbia, 291 U. S. 411 (Cert. granted 290 U. S. 619)	5
Cantwell v. Connecticut, 310 U. S. 296	4
Corrigan v. Buckley, 271 U. S. 323	2
District of Columbia v. Murphy, 314 U. S. 441 (Cert. granted 313 U. S. 556)	4
District of Columbia v. Pace, 320 U. S. 698	6
Harmon v. Tyler, 273 U. S. 688	3
Loughran v. Loughran, 292 U. S. 216 (Cert. granted 290 U. S. 621)	5
Tyler v. Harmon, 158 La. 439, 104 So. 200	3

Miscellaneous Materials

Blandford, John J., Jr., Administrator of National Housing Agency, Public Address, Columbus, Ohio, October 2, 1944	9
Citizens Committee on Race Relations, *Race Relations in the Nation's Capital,* First Annual Report of Citizens Committee on Race Relations, August 26, 1944	8
Kahen, *Validity of Anti-Negro Restrictive Covenants; a Reconsideration of the Problem* (1945), 12 U. of Chi. L. Rev. 198	4
Klutznick, *Public Housing Charts Its Course,* Survey Graphic, January 1945	10
Lee, Dr. Alfred M., *Statement* as reported in the Michigan Chronicle, May 9, 1945	11
McGovney, *Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants or Conditions in Deeds Is Unconstitutional* (1945), 33 Calif. L. Rev. 5	4
Weaver, *Racial Restrictive Housing Covenants,* 30 Journ. of Land and Public Utility Economics (1944), pp. 183, 190	14
Woofter, *Negro Problem in Cities* (1928), pp. 73, 95	10

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PETITION FOR A RECONSIDERATION OR REHEARING

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Comes now the petitioner herein and presents this petition for a reconsideration or rehearing and for the vacating of the judgment of this Court denying her Petition for a Writ of Certiorari to the Court of Appeals for the District of Columbia.

JURISDICTION

The judgment of this Court herein prayed to be reconsidered was entered on the 28th day of May, 1945. This petition for a reconsideration or rehearing is filed within twenty-five days from May 28, 1945, in accordance with Rule 33 of this Court.

REASONS FOR PETITION

I. Denial of certiorari here must leave the law of the District of Columbia on an issue of great importance settled not according to the independent judgment of the Court of Appeals but through misapprehension that controlling views have heretofore been expressed by this court.

In this case below, two of the three Justices of the Court of Appeals for the District of Columbia, Chief Justice Groner and Justice Edgerton, were sharply and irreconcilably divided on the question whether law and public policy permit the enforcement of racial restrictive covenants against persons not party thereto. Therefore, the vote of the third member of the Court, Justice Miller, became decisive on an important issue which had not theretofore been adjudicated in the District of Columbia. Justice Miller's brief concurring opinion was in the following language:

> *"The Supreme Court and this Court have established the law for the District of Columbia as it is set out in the majority opinion and we are bound to follow it. The considerations urged by Justice Edgerton are persuasively presented. If proper weight was not given to them in the earlier decisions and if present-day conditions do not justify the position then taken, it has been within the power of Congress to change the law, during all the intervening years. If judicial reinterpretation of the law is now in order, it is the function of the Supreme Court, as the highest Court of the District of Columbia, so to advise us."* (R. p. 41.) (Italics added.)

Thus, although the contention of Justice Edgerton appealed to the reason and judgment of Justice Miller, his erroneous belief that the Supreme Court—apparently in *Corrigan* v. *Buckley*—had sanctioned a doctrine so broad as to cover this case prevented him from exercising that judgment and impelled him to follow his mistaken interpretation of views heretofore expressed by this Court. Upon

such a determination a precedent of great importance now rests and an issue of the largest public significance becomes decisively adjudicated, so that the ever substantial barrier of *stare decisis* compromises its reexamination. This barrier is made all the more substantial here because the refusal of this Court to review this decision can and will be construed as meaning that the Court of Appeals is correct in reasoning that *Corrigan* v. *Buckley* is controlling in this case. It is significant and petitioner believes it appropriate for this Court to consider that within hours after the denial of certiorari in this case the action of the Court was broadcast over the radio and was headlined and featured as front page news in the Washington daily papers. The fact, rather than the substance of such comment, indicates the large public significance of any disposition of this case. The peculiar combination of circumstances here creates a situation in which a matter of great moment is permitted to become settled law without any such exercise of appellate judgment upon the merits of the controversy as the system of appellate review contemplates. It is submitted that this anomalous situation in itself should persuade this Court to reconsider its denial of certiorari.

II. The constitutional issues presented are substantial and should be disposed of only after full argument and consideration on their merits.

Without repeating the argument in petitioner's brief, it is urgently requested at this time that the Court consider the relation of its decision in *Harmon* v. *Tyler*, 273 U. S. 688, invalidating an ordinance prohibiting sale or lease of property to Negroes in any "community or portion of the city * * * except on the written consent of a majority of the persons of the opposite race inhabiting such community or portion of the city" (*Tyler* v. *Harmon*, 158 La. 439, 104 So. 200) to the present case where the courts of the District of Columbia are setting aside such a sale because of an agreement formerly made by certain inhabitants of the community.

These two situations should be compared in the light of the doctrine of *American Federation of Labor* v. *Swing*, 312 U. S. 321, and *Cantwell* v. *Connecticut*, 310 U. S. 296, that judge-made rules of substantive law like statutes may constitute state action within the meaning of the constitutional restraints applicable to the state. Here the judge-made, and thus state created, rule of property enforced against persons who never agreed to such a restriction is the equivalent of the state created and enforced restriction which this Court invalidated in the Harmon case. Certainly such apparent inconsistency merits judicial review in this Court.

The substantial character of this constitutional question and the outline of the arguments with reference thereto have been presented in petitioner's brief (pp. 22-23). It is a coincidental but significant commentary upon the substantial character of these issues and their current importance throughout the country that since the preparation of petitioner's brief, the same constitutional issues have been the subject of serious and responsible analyses in two of our leading national legal periodicals. See McGovney, *Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants or Conditions in Deeds is Unconstitutional* (1945) 33 Calif. L. Rev. 5; Kahen, *Validity of Anti-Negro Restrictive Covenants; A Reconsideration of the Problem* (1945) 12 U. of Chi. L. Rev. 198. These articles not only indicate the substance and importance of the constitutional arguments against restrictive covenants, but also how nation-wide misconception of *Corrigan* v. *Buckley* has distorted the law in this area.

III. The granting of certiorari here would be consistent with similar action by this Court in cases involving issues of local concern in the District of Columbia.

In *District of Columbia* v. *Murphy*, 314 U. S. 441 (1941), this Court granted certiorari (313 U. S. 556) to review a determination of the United States Court of Appeals for the

District of Columbia as to what constitutes domicile in the District of Columbia under common law principles. The issue arose under a local tax law applicable solely to the District and the only controverted question was whether the taxpayer had acquired a domicile in the District. It is difficult to imagine a controversy more localized in significance or a legal issue more plainly involving only a simple common law determination. This court granted certiorari "because of the importance of the questions involved." (314 U. S. at 449.)

It cannot be more important to people residing in the District of Columbia to have the Supreme Court expound the principles under which the domiciliary status of immigrants should be determined than to have the validity of ghetto creating, health impairing, crime breeding racial zoning considered and, after full argument, adjudicated by the Supreme Court.

Perhaps the most extreme recent case in which this Court has exercised discretionary review of a District of Columbia decision is *Best* v. *District of Columbia*, 291 U. S. 411 (1934), certiorari granted, 290 U. S. 619. The question there was simply whether the facts stated in the opening statement of plaintiff's counsel in a tort claim for negligent injury brought the case within the tort doctrine of "attractive nuisance." This Court seems to have deemed the outlining of the scope of the attractive nuisance doctrine in the District of Columbia a matter of sufficient moment for the granting of certiorari. The incalculably greater moment of the issues now presented is too apparent to require argument.

Again, in *Loughran* v. *Loughran*, 292 U. S. 216 (1934), certiorari granted, 290 U. S. 621, an issue solely of local law was reviewed. Without reaching any constitutional issue, this Court undertook to determine whether as a mixed matter of conflict of law principle and interpretation of the local divorce laws, a foreign marriage, after a District of Columbia divorce prohibiting remarriage, gave dower rights in

real property located in the District of Columbia. The question was the effect of a marriage upon property rights in the District of Columbia. Yet, it is submitted that more persons are likely to be affected and more seriously, and issues of larger public concern with reference to property rights are involved here where racial restrictive covenants are elevated to the status of property rights running with the land and made binding upon the world, than in the *Loughran* decision as to the dower rights of certain re-married divorcees in the District of Columbia.

Even this Court's most recent statement of reluctance to review District of Columbia decisions of exclusively local character is made in a case where the policy was disregarded, although the controversy was of only local concern. See *District of Columbia* v. *Pace*, 320 U. S. 698, 702 (1944).

Thus, even apart from the national significance of the issues here, within the policy heretofore manifest in granting certiorari to the Court of Appeals for the District of Columbia on local matters, this Court can, with propriety and consistency, review the judgment of which petitioner complains.

Beyond this, however, it is to be emphasized that the question of equity jurisprudence and property law here involves housing, a prime necessity of life, and depends for its solution upon a question of public policy to which the Constitution and laws of the United States furnish the guide and key. (See Petitioner's Brief herein, 11, 15-18.) Such a matter, even in its local aspect in the District of Columbia is so tied in with national law and policy as to merit decision by this Court.

IV. The demonstrable consequences of racial zoning by restrictive covenants are so grave in the District of Columbia and throughout the country that this Court should not refuse to adjudicate the issue as here presented.

While the wide extent and serious consequences of racial restrictions upon the ownership and use of housing were discussed in the dissenting opinion below (R. pp. 45-47) and outlined in petitioner's brief (pp. 16-17) here, the matter is so grave that a more detailed presentation seems appropriate at this time. The use of racial restrictive covenants has spread to the extent that Negroes in the major cities of the nation are restricted to insufficient space to allow for decent living and normal expansion. The result is excessive crowding of dwellings and congestion of neighborhoods with consequent deterioration, blight and slums, with the universally known baneful effects upon the economic, social and moral structure of not only the Negro segment of the population, but also of the entire community.

The United States Census of 1940 examines the characteristics of 19 million urban dwellings. The census classifies a dwelling as overcrowded if it is occupied more than 1½ persons per room. On this basis 8 percent of the units occupied by whites are classified in the 1940 census as overcrowded, while 25 per cent of those occupied by non-whites are so classified. In Baltimore, Maryland, Negroes comprise 20 percent of the population yet are constricted in 2 percent of the residential areas. In the Negro occupied second and third wards of Chicago, the population density is 90,000 per square mile, exceeding even the notorious overcrowding of Calcutta.

A similar situation exists in Washington where the Negro population has doubled since 1930. The 1930 Census showed 132,068 Negroes in the District of Columbia. The generally accepted present estimate of the Negro population is between 250,000 and 275,000. And while the increase in the white population has been cushioned in some measure by

the development of new areas in the District of Columbia and nearby Maryland and Virginia, the Negro continues to be restricted, largely under the impact of restrictive covenants, to intolerably overcrowded ghettos. Indeed, demolition of public buildings and roads and a limited slum clearance program without attendant development of new areas avaliable for Negro occupancy have tended to constrict the Negro population of to-day within an even smaller area than that already overcrowded by a population half as large in 1930. So serious are these strictures that although Congress directed the closing of all Washington alley dwellings by 1944, this period has already been twice extended because the super saturated Negro areas and restrictions upon other areas leave no alternatives but to permit the alley dwellers to remain where they are or put them in the streets. There can be no relief for this situation so long as racial covenants place artificial yet impassable boundaries around the existing areas of Negro occupancy.

The local situation in 1944 is thus summarized in "Race Relations in the Nation's Capital", Annual Report of Citizens Committee on Race Relations:

> "The housing situation is so bad as to rank as the No. 1 social problem of the community—
>
> "The problem has been aggravated by a tendency to condemn slums without providing equivalent housing facilities for the Negro tenants thus evicted. It has been further complicated by a tendency on the part of government officials to tear down Negro dwellings to make possible the erection of government buildings without making any provision whatever for the Negro residents thus deprived of a place to live. * * * And it is still further complicated by what may be the most serious factor of all, the scarcity of new land in the District for Nergo homes and a tendency on the part of white citizens to resist the movement of Negroes into what they consider to be their areas. The result is that the Negroes are squeezed tighter into a few little 'islands' within the District, and the squeezing process threatens

even to squeeze out these islands and drive the Negroes beyond the limits of the District of Columbia. This poses a social problem of the greatest magnitude and difficulty, and no solution is yet in sight."

Competent professionals working in the housing field repeatedly have pointed out the social cost and public injury which resulted from these restrictions. Thus, John J. Blandford, Jr., Administrator of the National Housing Agency, speaking in Columbus, Ohio, on October 2, 1944, had this to say:

"I do not need to tell you of the difficulties we encountered even after we could establish the need of migrating Negro war workers. We met troubles from the start of the war housing job, but they were multiplied every time we tried to build a project open to Negroes. These difficulties—of site selection, of obtaining more 'living space'—were deep-rooted and had to be overcome, one by one. And delays only made more desperate the plight of both those who migrated to take war jobs and those already living in war industry centers.

"The average citizen knows generally that restrictions on Negroes abound, just as he knows slums abound in our major cities. But does he know that, as in those cities, there's hardly a decent piece of land a Negro can build on in his own home town? Does he know that new living space is imperative because the present limited spaces are crowded to the point that disease and crime ultimately will be bred there—if it doesn't already exist? Does he know how the concentration of war industries has affected the lives of Negroes who have lived a few blocks away from his own home for years—now crowded together as never before—or the newcomers who have been forced upon them? Well, if not, the facts must be told and told again as facts about his home town—not of cities far away.

"The core of the housing problem of Negroes is, of course, more living space."

To the same effect is the comment of the Commissioner, Federal Public Housing Authority, Philip M. Klutznick, in his article, *Public Housing Charts Its Course,* published in Survey Graphic for January, 1945:

> "But the minority housing problem is not one of buildings alone. More than anything else it is a matter of finding space in which to put the buildings. Large groups of these people are being forced to live in tight pockets of slum areas where they increase at their own peril; they are denied the opportunity to spread out into new areas in the search for decent living.
>
> "The opening of new areas of living to all minority groups is a community problem. And it is one of national concern."

This is not a new situation, but it is becoming more aggravated from year to year. As far back as 1928 one of the most discerning writers in this field clearly pointed out what was happening and its social dangers:

> "Congestion comes about largely from conditions over which the Negroes have little control. They are crowded into segregated neighborhoods, are obliged to go there and nowhere else, and are subjected to vicious exploitation. Overcrowding saps the vitality and the moral vigor of those in the dense neighborhoods. The environment then, rather than hereditary traits, is a strong factor in increasing death-rates and moral disorders. Since the cost of sickness, death, immorality and crime is in part borne by municipal appropriations to hospitals, jails and courts, and in part by employers' losses through absence of employees, the entire community pays for conditions from which the exploiters of real estate profit." Woofter, Negro Problem In Cities (1928) at 95.

It is also widely recognized that these anti-social covenants are not characteristically the spontaneous product of the community will, but rather result from the pressures and calculated action of those who seek to exploit for their

own gain residential segregation and its consequences. This process has been aptly described by Woofter, *op. cit. supra* at 73:

> "The riots of Chicago were preceded by the organization of a number of these associations (neighborhood protective associations); and an excellent report on their workings is to be found in *The Negro in Chicago*, the report of the Chicago Race Commission. The endeavor of such organizations is to pledge the property holders of the neighborhood not to sell or rent to Negroes, and to use all the possible pressures of boycott and ostracism in the endeavor to hold the status of the area. They often endeavor to bring pressure from banks against loans on Negro property in the neighborhood, and are sometimes successful in this.
>
> "The danger in such associations lies in the tendency of unruly members to become inflamed and to resort to acts of violence. Although they are a usual phenomenon when neighborhoods are changing from white to Negro in northern cities, no record was found in this study where such an association had been successful in stopping the spread of a Negro neighborhood. The net results seem to have been a slight retardation in the rate of spread and the creation of a considerable amount of bitterness in the community." Cf. Embree, Brown Americans (1943) at 34 reporting 175 such organizations in Chicago alone. James M. Haswell, in a featured article in the Detroit Free Press for March 17, 1945, estimates 150 such organizations are functioning in Detroit.

The same thesis with reference to the City of Detroit was recently elaborated by Dr. Alfred M. Lee, Professor of Sociology at Wayne University:

> "Emphasizing overcrowding and poor housing as one of the major causes of racial disturbances, Lee declared that in his opinion real estate dealers and agents have been doing more to stir up racial antagonisms in Detroit than any other single group.
>
> " 'These men (real estate dealers),' Lee said, 'are

the ones who organize, promote and maintain restrictive covenants and discriminatory organizations. I am convinced that once it is possible to break the legality of these covenants, a great deal of our troubles will disappear.' As reported in The Michigan Chronicle for May 9, 1945."

In somewhat more legalistic analysis, such concert and agreement on area restrictions, supported by the courts, create conditions of monopoly and restraint of trade with reference to the essential commodity of housing. In an artificially restricted market the Negro not only finds housing scarce, he also gets less housing value for his dollar than the unrestricted white citizen who can trade in a free market. The following table extracted from the 1940 Census is a comparison of whites and non-whites paying identical rents in the District of Columbia and showing how much worse housing the non-whites get for the same money.

DISTRIBUTION IN RENTAL VALUE GROUPS AND RELATIONSHIP BETWEEN RENTAL GROUPS AND CONDITION OF DWELLINGS, BY RACE OF OCCUPANTS, FOR THE DISTRICT OF COLUMBIA.[1]

Estimated Monthly Rental Value	All Occupied Units				Substandard Dwelling Units[2]				
	White		Non-White		Number		Percentages of Total Units Occupied by Respective Racial Groups		
	Number	Distribution	Distribution	Number	White	Non-White	White	Non-White	Ratio between Percentages
All Occupied Units Reporting State of Plumbing and Repairs	124,194	100.0	100.0	36,853	15,683	14,860	12.6	40.3	3.2
Under $5	91	.1	.3	99	46	87	50.5	87.9	1.7
$ 5 - $9	168	.1	1.7	635	116	616	69.0	97.0	1.4
$10 - $14	592	.5	8.4	3,111	478	2,874	80.7	90.4	1.1
$15 - $19	1,427	1.1	11.3	4,164	1,094	3,404	76.7	81.7	1.1
$20 - $24	3,386	2.7	12.1	4,444	2,320	3,171	68.5	71.4	1.0
$25 - $29	5,305	4.3	12.6	4,640	2,695	2,276	50.8	49.1	1.0
$30 - $39	20,388	16.4	21.3	7,848	5,075	1,576	24.9	20.1	1.2
$40 - $49	24,901	20.1	15.9	5,854	2,095	514	8.4	8.8	1.0
$50 - $59	23,039	18.6	8.8	3,245	930	205	4.0	6.3	1.6
$60 - $74	19,881	16.0	5.2	1,932	465	98	2.3	5.1	2.2
$75 - $99	13,884	11.2	1.8	672	238	32	1.7	4.8	2.8
$100 and Over	11,132	8.9	.6	209	131	7	1.2	3.3	2.8

[1]SOURCE: Sixteenth Census of the United States, Vol. III, Housing, "Characteristics by Monthly Rent or Value," Tables A-2, A-3, and A-5a.
[2]Units needing major repairs or with plumbing deficiencies.

In August 1944 the conservative Journal of Land and Public Utility Economics published this commentary on the characteristic economic pattern of artificial over valuation in the "Negro market" as controlled by residential segregation.

> "There are no conclusive studies of the influence of Negro occupancy upon property values. There is, however, strong evidence in everyday observations to support Moron's contention that 'smart real estate dealers have encouraged Negroes to move into old white neighborhoods where property values have begun to decrease. In the change of settlement the same houses automatically acquire a higher resale value or command higher rentals; while, in the case of rent property, the assessed valuation for tax purposes continues to decrease as if there had been no reversal of the income trend.' The owners in a transitional area have a monopoly on the available supply; this means * * * that the selling price is usually above the market value prior to Negro occupancy. * * * In American cities the Negro has become a handy dumping ground for obsolescent property. * * * These families usually pay excessive prices for houses which have become obsolete * * *." See Weaver, *Racial Restrictive Housing Covenants*, 30 Journal of Land and Public Utility Economics (1944), 183, 190.

It is difficult to conceive of an economic and social situation involving more critical issues of public welfare or in which it is more important that the intervention of inferior courts to perpetuate and extend a grave evil should be reviewed by this Court.

Better homes make for a better type of citizen, and the development of the highest possible type of citizen is a principal concern of the state. As good homes are vacated for better homes a process of civic development occurs. The citizen by means of industry and thrift works and aspires to acquire a better home and ultimately the best for his family. This process in a free market and a prosperous

economy should eventually eradicate substandard living conditions which are not merely a rebuff to our civic pride, but a positive menace both to public health and safety.

To permit white citizens by agreement among themselves to deprive colored citizens of their rightful participation in this process would be gravely hurtful to the public welfare and at the same time would stimulate antipathy existing between the races. Those of the dominant race afflicted with race prejudice would become more arrogant and more oppressive in their consciousness and exercise of power, while the unfortunate victims would lose faith and hope in the protection and force of the supreme law of the land, the impartial administration of justice by our courts, the conscience of the dominant race and the righteousness of the nation. It would undoubtedly produce a situation of ever-increasing contempt for the weak on the part of the strong and more bitter hatred of the strong on the part of the weak.

No more important question can be presented to this Court. The direct interest of one-third of the population of the District of Columbia, and more than fifteen million citizens of the country at large, is at stake, and with it the basic welfare of all.

In their effort to rise from slavery to equality with their fellow men, colored citizens are everywhere met by the effort to keep them down, and to deny them that equal opportunity which the Constitution secures to all. If they can be forbidden to live on their own land, they can be forbidden to work at their own trade. If this is possible, the prejudice against which the war amendments were framed to defend the colored people triumphs over them, and the amendments themselves become dead letters.

CONCLUSION

Petitioner believes that this case presents both a substantial question of equity jurisprudence and a substantial constitutional contention not heretofore adjudicated by this

Court, and that this case involves interests of the greatest public concern. It is submitted that final disposition of such a matter should not be by summary denial of certiorari without full argument or consideration of the issues on their merits. For the foregoing reasons petitioner respectfully urges that a rehearing be granted and that the judgment of May 28, 1945, denying certiorari be set aside.

Respectfully submitted,

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